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# A Model Statute for the Development of Oil and Gas Interests Held Under Joint Ownership

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## A Model Statute for the Development of Oil and Gas Interests Held Under Joint Ownership

Like many other interests in property, the oil and gas rights in a single tract of land are often held by more than one person. Concurrent ownership of oil and gas rights can take the form of "tenancy in common, joint tenancy, tenancy by entirety, coparcenary, community property and partnership property."<sup>1</sup> Because cotenants<sup>2</sup> simultaneously have "equal rights in the possession and use" of the property,<sup>3</sup> conflicts often arise when one cotenant wants to develop the resources but another does not. This Comment will discuss whether a cotenant of an oil and gas mineral interest has the right to explore, develop, or otherwise exploit the resources without the consent of the other cotenants.<sup>4</sup>

States follow one of two rules when confronted with this issue. The majority rule does not require cotenant consent, while the minority rule does to varying degrees. Part I of this Comment introduces the English statutes that form the foundation for both rules. Part II discusses the majority rule by looking at case law and statutory law of states that follow this rule. Part III then analyzes the minority rule. Part IV presents an administrative scheme that represents a compromise between the two rules in an effort to equitably protect cotenants holding either majority or minority interests.

### I. THE LAW AGAINST WASTE AND THE RULE OF ACCOUNTING

Two English statutes provide the framework within which states have developed their current laws concerning the rights cotenants enjoy to independently develop the common property. Indeed, "the lack of uniformity in the law among the states [in

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1. 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 5.1 (1987).

2. Although the various forms of co-ownership differ in many respects, both in theory and practical effect, the term "cotenants" will be used in this Comment to describe "any situation in which two or more persons simultaneously may assert interests—socially-enforced claims—referable to an item of realty." JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 322 (6th ed. 1990).

3. *Id.*

4. This Comment discusses the attributes of joint ownership only tangentially. For a general discussion of joint ownership, see 4A RICHARD R. POWELL, THE LAW OF REAL PROPERTY chs. 49-52 (1991).

this area] can best be described in the light of the varying interpretation of [these] statutes or their contemporary counterparts."<sup>5</sup>

### A. *The Law Against Waste*

The Statute of Westminster II,<sup>6</sup> passed in 1285, is the first codified expression of the law against waste. Prior to this statute, "there was no action for waste in favor of one cotenant against another cotenant."<sup>7</sup> The statute provided that, "Whereas two or more do hold Wood, Turf-land, or Fishing, or *other such thing* in common, . . . and some of them do Waste against the Minds of the other, an Action may lie by a Writ of Waste."<sup>8</sup>

In an action for waste, the statute provided a choice of two remedies. First, the land could be partitioned and "the Part wasted shall be assigned" to the defendant.<sup>9</sup> Second, the defendant could be restrained and ordered "to take nothing from henceforth in the [land] . . . but as his Partners will take."<sup>10</sup>

Many states have adopted similar statutes. For example, Alaska provides the following:

If a guardian, tenant for life or years, or tenant in common of real property commits waste on the property, a person injured by the waste may bring an action for damages for the injury. In an action for waste there may be judgment for treble damages. Where the plaintiff has a reversionary interest and the injury due to waste equals or exceeds the value of the interest held by the one committing the waste, or the waste is committed with malice, judgment may be for forfeiture of the estate and eviction.<sup>11</sup>

Alaska's statute, like most other state statutes,<sup>12</sup> does not specifically define the term "waste." Consequently, the term must be defined by the state courts. The Alaska courts have stated

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5. 1 KUNTZ, *supra* note 1, § 5.2.

6. Statute of Westminster II, 1285, 13 Edw., ch. 22 (Eng.).

7. 1 KUNTZ, *supra* note 1, § 5.2.

8. 13 Edw., ch. 22 (emphasis added) (spelling modernized).

9. *Id.*

10. *Id.*

11. ALASKA STAT. § 09.45.740 (1983).

12. See OHIO REV. CODE ANN. § 5307.21 (Anderson 1989) ("One coparcener may maintain an action of waste against another coparcener."); WYO. STAT. § 1-32-119 (1977) ("One (1) parcener may maintain an action of waste against another, but no parcener shall possess any privileges over another in any election, division, partition or matter to be made or done concerning lands which have descended.").

that waste occurs when a cotenant engages in conduct that either results in physical damage to the land or substantial diminution in value of the common property.<sup>13</sup>

Because the various state jurisdictions must individually define "waste," it is not surprising that a lack of uniformity exists in determining whether development of oil and gas interests by one cotenant without the consent of the other cotenants constitutes "waste." As will be discussed in detail, a majority of states hold that such conduct does not constitute waste;<sup>14</sup> however, a minority of states maintain that a nonconsenting cotenant may have an action for waste against a cotenant's development.<sup>15</sup>

### B. *The Rule of Accounting*

Like the law of waste, the rule requiring a cotenant to account to fellow cotenants for all profits and rents received from the common property had its genesis in early English legislation. The rule of accounting was established in 1705 by the Statute of Anne,<sup>16</sup> which reads as follows:

[A]ctions of account shall and may be brought and maintained . . . by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion . . . .<sup>17</sup>

The rule giving a cotenant the right to seek an accounting has been statutorily adopted in most states. For example, Arkansas's "Right of cotenants to accounting" statute reads as follows:

(a) When any joint tenant, tenant in common, or coparcener in any real estate, or any interest therein, shall take, use, or have the profits and benefits thereof in greater proportion than his interest therein, that person, or his executor or administrator, shall account therefor to his cotenant or cotenants, jointly or severally.

(b) Joint tenants, tenants in common, and coparceners in any real or personal estate may maintain civil actions against

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13. See *McKibben v. Mohawk Oil Co.*, 667 P.2d 1223 (Alaska 1983).

14. See *infra* part II.

15. See *infra* part III.

16. 1 KUNTZ, *supra* note 1, § 5.2.

17. Statute of Anne, 1705, 4 Anne, ch. 16, § 27 (Eng.) (spelling modernized).

their cotenants who receive as bailiffs more than their due proportion of the benefits of the estate.<sup>18</sup>

Other states have similar statutes.<sup>19</sup> Thus, depending on the jurisdiction, the interaction of the law against waste and the rule of accounting provides a cotenant with two possible remedies when another cotenant extracts oil and gas. If extraction of the resources without consent is considered waste, the cotenant can seek an injunction to stop the activity and obtain damages. Alternatively, the extracting cotenant may be able to continue the venture, but other cotenants may bring suit seeking an accounting for any profits over his proportional share.<sup>20</sup>

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18. ARK. CODE ANN. § 18-60-101 (Michie 1987). However, in Arkansas, the right to an accounting does not apply to the tenancy by the entirety of a husband and wife. See *Wood v. Wright*, 386 S.W.2d 248 (Ark. 1965). Also, for a discussion of the interesting issue of the interaction between a cotenant making improvements on the land and the right to accounting by the other cotenants, see *Cocke v. Clausen*, 55 S.W. 846 (Ark. 1900).

19. For a sampling of other state statutes, see ALA. CODE § 6-7-40 (1985) ("A joint tenant, tenant in common, or tenant in coparcenary may commence an action against his cotenant or coparcener, or personal representative for receiving more than his lawful proportion."); ALASKA STAT. § 34.15.120 (1990) ("A tenant in common may maintain an action against a cotenant for receiving more than the fair share of the rents and profits of the estates owned by them in common."); OHIO REV. CODE ANN. § 5307.21 (Anderson 1991) ("One tenant in common, or coparcener, may recover from another tenant in common, or coparcener[,] his share of rents and profits received by such tenant in common or coparcener from the estate, according to the justice and equity of the case."); WYO. STAT. § 1-32-119 (1977) ("One (1) tenant in common or coparcener may recover from another his share of rents and profits received by the tenant in common or coparcener from the estate.").

20. It should be noted here, as will be shown later, that the rule requiring a cotenant to account to other cotenants is essentially followed in both the majority and minority jurisdictions. Consequently, the real issue is whether the nonconsenting cotenant has one or two remedies. Generally, he will always be able to force an accounting, but he may also have the right to enjoin the activity and seek damages if the jurisdiction considers extraction without consent of the other cotenants waste.

It should also be mentioned that the rule of waste applies uniformly in all jurisdictions in some situations. For example, in all jurisdictions, "operations that result in permanent damage to the land when such operations are not necessary to the extraction of minerals from the same land" are considered waste, whether performed by a cotenant or someone acting under his direction. 1 KUNTZ, *supra* note 1, § 5.2. Therefore, this Comment is limited to the question of whether extraction of the oil and gas is considered waste when those operations are legitimate and necessary to the development and extraction of the resources.

This is also a good place to mention what this Comment will not cover in any great detail. First, the rules and methods which individual jurisdictions have adopted to define and govern accounting actions will not be arrayed or elaborated upon. The various methods used are vast and often complex enough to serve as

These two statutes, the law against waste and the rule of accounting, form the framework for the majority and minority rules which will now be discussed in detail.<sup>21</sup> Case law and statutes of states following each rule will be presented, emphasizing the rationale used by the respective states in choosing one rule over the other.

## II. THE RIGHT TO EXTRACT OIL AND GAS WITHOUT CONSENT: THE MAJORITY RULE

### A. *Prairie Oil & Gas Co. v. Allen and the Majority Rule*

The seminal case describing the majority rule arises out of an Oklahoma fact situation. In *Prairie Oil & Gas Co. v. Allen*,<sup>22</sup> Allen owned a one-tenth interest in the oil and gas underlying an expansive tract of land. Her cotenants and owners of the other nine-tenths interest in the oil and gas began developing and producing the resources. Allen did not consent to the extraction and sued, claiming that because of her nonconsent the operators were trespassers and liable for conversion.<sup>23</sup>

The Eighth Circuit disagreed. It first recognized that Allen and the defendants were indeed tenants in common and as such "may make such reasonable use of the common property as is necessary to enjoy the benefit and value of such owner-

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individual paper topics themselves. For a nice overview of some of the major principles involved in accounting actions, see Howard R. Williams, *The Effect of Concurrent Interests on Oil and Gas Transactions*, 34 TEX. L. REV. 519, 523-34 (1956).

Furthermore, concurrent owners may use any remedy available to other joint owners of other property interests, other than the two listed above (suit in damages for waste and accounting). A concurrent owner may also seek partition, equitable partition, and development and management under a receiver. But these remedies are generally not economically feasible. Because these remedies are difficult to apply to oil and gas interests, this Comment will focus on the two remedies listed earlier. For more information on other remedies available, see Ernest E. Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEX. L. REV. 129, 136-50 (1964); Williams, *supra*, at 534-49.

21. It should be mentioned that all states but one have these two rules as part of their common law or statutory law, derived from English jurisprudence. The exception, of course, is Louisiana, whose law grew out of the French Civil Code. "In Louisiana, the Statutes of Westminster II and Anne are not part of the traditional law, nor have counterparts of such statutes been enacted." 1 KUNTZ, *supra* note 1, § 5.4. That is not to say that Louisiana does not have similar doctrines; it does. These doctrines are simply founded on different traditions. See *infra* part III.A.

22. 2 F.2d 566 (8th Cir. 1924).

23. *Id.* at 569-70.

ship."<sup>24</sup> The court then implicitly ruled that the extraction of oil and gas is not considered waste. It stated that an oil and gas interest "can only be enjoyed by removing the products thereof" and therefore, the "extraction of oil from an oil well [is] the use *and not the destruction* of the estate."<sup>25</sup> The court then stated what is now the majority rule: "This being true (the fact that extraction of oil is not waste), a tenant in common, without the consent of his cotenant, has the right to develop and operate the common property for oil and gas and for that purpose may drill wells and erect necessary plants."<sup>26</sup>

The rationale the court used to support the right to extract oil and gas without receiving the consent of cotenants was based primarily on circumstances potentially arising out of the law of capture. In describing the law of capture, the court wrote that oil, as a "fugitive substance," is always in danger of being "drained from the land by [a] well on adjoining property."<sup>27</sup> In order to protect his interest, the cotenant must act "promptly" before the oil is taken, and "if a cotenant owning a small interest in the land had to give his consent" before the other cotenants could act, the nonconsenting cotenant "could arbitrarily destroy the valuable quality of the land."<sup>28</sup> However, the court offered no further rationale for why the cotenants in *Prairie Oil* had the right to develop and produce the minerals where there was no evidence that the oil was being drained or in danger of being drained.

Although the extraction of oil and gas without the consent of all cotenants is not considered waste in Oklahoma,<sup>29</sup> the

24. *Id.* at 571.

25. *Id.* (emphasis added).

26. *Id.* The court did add that this rule does have a limitation: the cotenant may not "exclude his cotenant from exercising the same rights and privileges." *Id.*

27. *Id.* (quoting *Burnham v. Hardy Oil Co.*, 147 S.W. 330, 335 (Tex. Civ. App. 1912)).

28. *Id.* (quoting *Burnham*, 147 S.W. at 335). The same rationale is expressed in a California case. The California Supreme Court held that "it is not waste for a cotenant to go upon the land and produce oil" even without the consent of the other cotenants. *Dabney-Johnston Oil Corp. v. Walden*, 52 P.2d 237, 246 (Cal. 1935). The court considered the taking of oil and gas to be using the estate rather than destroying it. "This principle," the court stated, "is of special importance in regard to fugacious substances, which may be lost entirely through drilling operations on other lands if the owners do not diligently seek to reduce them to possession." *Id.*; cf. *McIntosh v. Ropp*, 82 A. 949 (Pa. 1912) ("[O]wing to the fugacious nature of oil and gas, . . . it is peculiarly necessary that cotenants should not be unduly restricted in the enjoyment of such properties.").

29. The rule applied in *Prairie Oil* was already well established in Oklahoma

nonconsenting cotenant does have the right to force the producing cotenant to account for all profits obtained. This duty to account is generally established by statute<sup>30</sup> and is specifically applied to oil and gas extraction by case law.<sup>31</sup>

The rule established in *Prairie Oil* has had precedential influence in other states that have considered this issue. In 1976, the Supreme Court of Georgia decided for the first time whether it would require consent from nondeveloping cotenants when another cotenant desired to develop jointly held oil and gas rights. In *Slade v. Rudman Resources, Inc.*,<sup>32</sup> plaintiffs owned a one-half interest both in the surface and in the minerals in the property at issue. Plaintiffs sued their cotenants (owners of the remaining one-half interest), seeking a declaratory judgment that the cotenants "have no rights of . . . use in or to the subject real property without [plaintiffs'] consent."<sup>33</sup>

The court initially established the rule that "a grant of minerals conveys, by implication, the rights of ingress and egress, and possession of the surface necessary to the use and enjoyment of the estate conveyed."<sup>34</sup> However, the issue of whether this right could be exercised without consent of co-owners was a "question of first impression."<sup>35</sup> After being confronted with both the majority and minority rules, the court adopted "the prevailing [majority] rule because it makes sense."<sup>36</sup> Therefore, in Georgia, "a co-tenant has . . . the right

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case law. In *Moody v. Wagner*, the Oklahoma Supreme Court held that

each tenant in common has the right to enter upon the common premises and explore and develop the same for oil and gas and to produce such products from the premises, provided however, that a cotenant cannot exclude his cotenant from exercising the same right with reference to the common property.

*Moody v. Wagner*, 23 P.2d 633, 635 (Okla. 1933). However, *Prairie Oil* is important for its explicit language that this right is fully available whether or not the other cotenant or cotenants consent.

30. "A joint tenant, or tenant in common, or tenant in coparcenary, may maintain an action against his cotenant or coparcener, or their personal representatives, for receiving more than his just proportion of the rents and profits." OKLA. STAT. ANN. tit. 41, § 21 (West 1986). For more information on co-ownership in Oklahoma, see Osborne M. Reynolds, Jr., *Co-ownership of Property in Oklahoma*, 27 OKLA. L. REV. 585 (1974).

31. See *Prairie Oil*, 2 F.2d at 573; *Moody*, 23 P.2d at 635-36; *Airington v. Airington*, 192 P. 689, 690 (Okla. 1920).

32. 230 S.E.2d 284 (Ga. 1976).

33. *Id.* at 285.

34. *Id.*

35. *Id.* at 286.

36. *Id.* The court does not reveal exactly why the majority view "made sense."



to enter and mine the common property, without the consent of his co-tenants, but subject to his accounting to the other cotenants for their respective shares."<sup>37</sup> Therefore, simply because it "made sense," the Georgia Supreme Court adopted the majority view, limiting the remedy a nonconsenting cotenant has to a forced accounting.<sup>38</sup>

In *Davis v. Byrd*,<sup>39</sup> a Missouri court of appeals was given the task of determining whether development of a mineral interest held in co-ownership, without the consent of other cotenants, constituted "waste" under the Missouri statutes. Like *Slade v. Rudman Resources* in Georgia,<sup>40</sup> this issue was one of first impression in Missouri.<sup>41</sup> In *Davis*, plaintiffs sought to enjoin their cotenant defendants from extracting minerals from the common estate.<sup>42</sup> The primary premise of their arguments was that extraction of minerals from jointly owned property constituted waste.

Missouri statutory law establishes that if "a tenant in common, joint tenant or parcener commit waste, he shall be liable to his cotenants, jointly or severally, for damages."<sup>43</sup> The court recognized that "two distinct rules" exist in relation to the issue of development of mineral interests without consent of other cotenants: one that considers such activity waste and another that does not.<sup>44</sup> In determining which rule to follow, the court looked to neighboring jurisdictions, namely Oklahoma<sup>45</sup> and Kansas.<sup>46</sup> After a "thorough study of the applica-

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It probably made sense because it was the right thing to do. Nevertheless, no other rationale is given.

37. *Id.*

38. See GA. CODE ANN. § 23-2-70 (Harrison 1982) ("Equity jurisdiction over matters of account shall extend to: . . . (5) Accounts between partners or tenants in common . . .").

39. 185 S.W.2d 866 (Mo. Ct. App. 1945).

40. 230 S.E.2d at 286; see *supra* note 35 and accompanying text.

41. Concerning the plaintiff's claim that a tenant in common "may prevent the mining of mineral lands by refusing to join his cotenant in the enterprise," the court wrote that "[w]e find no case in Missouri which we think is clearly in point and none has been cited that is decisive of this question." *Davis*, 185 S.W.2d at 867.

42. Although this case deals with hard minerals, it nonetheless equally applies to oil and gas.

43. MO. ANN. STAT. § 537.460 (Vernon 1988).

44. *Davis*, 185 S.W.2d at 867.

45. *Id.* at 868 (citing *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924)).

46. *Id.* (citing *Compton v. People's Gas Co.*, 89 P. 1039 (Kan. 1907)). Kansas, like Oklahoma, follows the majority rule allowing cotenants to explore and extract

ble law," the court found that acting without the consent of cotenants did not constitute "waste under the waste statute in Missouri" and therefore an action for damages or an injunction was not available.<sup>47</sup>

One judge, concurring in the judgment, gave an often-used rationale for the majority rule. He wrote, "[I]f the owner of one-half interest in mining land can prevent the owners of the other half . . . from mining . . . the owner of a thousandth interest can do likewise; the position of plaintiff is thus capable of reduction to absurdity."<sup>48</sup> Therefore, in Missouri, like the

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oil and gas from the common property without the consent of the other cotenants. In *Krug v. Krug*, 618 P.2d 323 (Kan. Ct. App. 1980), this rule was strictly applied. Interestingly, the plaintiffs in *Krug* were the producing cotenants and the defendant was the nonconsenting co-owner. The plaintiffs, who owned a nine-elevenths interest in the minerals under a half-section of land, sought to compel their lessees and Krug (who owned the remaining two-elevenths interest) to explore and drill for oil under the tract. *Id.* at 324. The cause of the suit was Krug's unwillingness to work with plaintiff's lessees and the fact that a neighboring property was "presumably draining the pool thought to be under the land in question." *Id.*

The court, without much discussion, reiterated the Kansas rule that cotenants have the right to explore and drill "even without [the] consent" of other cotenants. *Id.* at 325 (citing *Compton*, 89 P. 1039). Although not stated explicitly, it appears that the Kansas courts also do not consider such activity "waste" on the property and therefore, the cotenant has no injunctive or damages remedy.

The court then stated the rule that a nonconsenting cotenant has the remedy to seek an accounting. *Id.* at 325-26. The right to recover rents and profits is also found at KAN. STAT. ANN. § 58-2522 (1992), which reads, "A joint tenant, or tenant in common, or tenant in coparcenary, may maintain an action against his or her cotenant or coparcener or their personal representatives, for receiving more than his or her just proportion of the rents and profits." It is interesting to note that the rule of accounting can be used to require a nonconsenting cotenant to aid in the payment of production costs. The general rule of accounting is that the nonconsenting cotenant is allowed a percentage of the profits only after accounting to the producer for a "proportionate share of the expense of drilling, production, and, if need be, marketing." *Krug*, 618 P.2d at 325. However, in Kansas, the nonconsenting cotenant must account for expenses only if there is production. Therefore, if a cotenant drills two holes, and the first is a producer and the second a dry hole, a nonconsenting cotenant is only required to pay drilling expenses on the first hole. *Id.* at 325-26; see also *Davis v. Sherman*, 86 P.2d 490 (Kan. 1939).

47. *Davis*, 185 S.W.2d at 869. In establishing this rule, the court wrote,

From a thorough study of the applicable law and the many cases cited we find that both the rules . . . are supported by respectable authorities. However, the greater weight of authority seems to hold that a tenant in common commits no wrong in entering upon the common property for the purpose of carrying on mining operations in the usual way and therefore cannot be held to be a trespasser; and that the removal of ore without willful injury to the common property or unnecessary destruction caused by negligence or unskillfulness does not constitute waste.

*Id.*

48. *Id.* (Blair, J., concurring in the judgment); cf. *Dabney-Johnston Oil Corp.*

other states discussed, a cotenant has the right to develop the mineral estate without the consent of the other cotenants, subject only to the rule requiring accounting.

### B. *An Evaluation of the Majority Rule*

With the exception of four states,<sup>49</sup> all significant oil producing states follow the majority rule that "a cotenant in the fee may enter to explore for and produce oil and gas without consent of his cotenants."<sup>50</sup> There appear to be three primary rationales used to substantiate this rule. First, because of the fugitive nature of oil and gas, and the law of capture, it is necessary to allow each cotenant the complete right to extract the oil or gas in order to protect it from neighboring lands that may dip into the same pool.<sup>51</sup> Second, because the oil and gas must be removed to be enjoyed, exploration and removal of the resources does not constitute waste or destruction of the interest but rather the "use" of the interest.<sup>52</sup> And third, requiring consent from all cotenants would allow one cotenant with a small interest to block the interests of the others with larger interests; this seems to be inequitable or even irrational.<sup>53</sup>

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v. Walden, 52 P.2d 237, 246 (Cal. 1935) ("A single cotenant should not be in a position to prevent beneficial utilization of the mineral estate by the other cotenants.").

49. See *infra* part III.

50. 1 KUNTZ, *supra* note 1, § 5.3 (citing *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924)). For a small sampling of other states following this rule, see the following:

Kentucky: *Petroleum Exploration Corp. v. Hensley*, 284 S.W.2d 828, 830 (Ky. Ct. App. 1955) (Because the corporation was a cotenant, it "was not a trespasser" when it drilled and removed oil "as it had the right to drill on the commonly owned property without the consent of appellee.").

Montana: *Hochsprung v. Stevenson*, 266 P. 406, 409 (Mont. 1928) (In a cotenancy, "each of the cotenants may work [the property] without being guilty of waste.").

Pennsylvania: *McIntosh v. Ropp*, 82 A. 949 (Pa. 1912) (The defendant was allowed to extract oil without the consent of the plaintiff co-owner, but was required to account.).

Texas: *Rosse v. Northern Pump Co.*, 353 S.W.2d 287 (Tex. Civ. App. 1962) ("A tenant in common has the right to occupy the entire joint property [without consent] but if he removes oil or gas he must account to the co-tenant for the value of the proportionate shares of the oil and gas . . .").

Utah: *Bennion v. ANR Prod. Co.*, 819 P.2d 343 (Utah 1991).

51. See *supra* notes 27-28 and accompanying text.

52. See 1 KUNTZ, *supra* note 1, § 5.3; *supra* notes 25, 47 and accompanying text.

53. See *supra* note 48 and accompanying text.

Few would argue against the first rationale. If the land is being drained by operations on neighboring lands, any cotenant should be allowed to, and perhaps has a duty to, prevent the drainage. Also, it is economically irrational that a cotenant would attempt to stop another cotenant who was extracting the oil and gas because it was being drained by a neighboring pump. Furthermore, because the subject property is rarely being drained in these cases, if the majority rule were limited to drainage fact situations, it would have a very limited application.

The second rationale is also defensible. Having a mineral interest is arguably worthless unless the mineral can be developed. But in the oil and gas context this is not entirely true. Because of their speculative value, oil interests and leases can be very valuable before exploration.<sup>54</sup> If a cotenant would rather wait and sell his interest before it is determined whether oil exists, or how much exists, in the property, why not allow him the right to stop development? Both cotenants own their interests in fee, so why should development always take precedence over resale speculative value? It is arguable that exploring for oil and determining the actual value of the interest is waste if the speculative value of the interest is thereby diminished.

The third rationale is not so convincing. If it is irrational or inequitable to allow a minority tenant to stop development, is it not equally irrational or inequitable to allow minority tenants to develop the land when the majority would rather wait? If oil and gas prices are anticipated to rise in the near future, it is quite reasonable to wait and develop when profits will be higher. Also, it may be wise to wait until explorations on surrounding parcels of land are carried out, especially if a cotenant is more interested in the speculative value of his mineral interest. The third rationale supports the right of a cotenant to enjoin development as much as it supports the right of a cotenant to develop without consent.

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54. See *Humble Oil & Ref. Co. v. Kishi*, 291 S.W. 538 (Tex. Comm'n App. 1927); *Martel v. Hall Oil Co.*, 253 P. 862 (Wyo. 1927). For a good discussion of the speculative value associated with oil and gas interests, see Howard R. Williams & Charles J. Meyers, *Adverse Possession and Trespass in the Law of Oil and Gas*, 29 ROCKY MTN. L. REV. 1, 43-61 (1956).

Before this Comment continues its discussion of these ideas,<sup>55</sup> the minority rule and its rationales need to be introduced. Unlike the majority-rule states, the states following the minority rule are not entirely congruent in their application. Much of this incongruence arises from the fact that statutory law plays a more active role in some minority-rule states than in majority-rule states. Because of this incongruence, and since only four states currently follow the minority rule, each of those states will be briefly discussed.

### III. REQUIRING CONSENT OF COTENANTS BEFORE DEVELOPMENT: THE MINORITY RULE

#### A. Louisiana

In Louisiana, unlike the states following the majority rule, the right a cotenant has to extract minerals is rather restricted. The most oft-cited Louisiana case implementing the minority rule is *Gulf Refining Co. v. Carroll*.<sup>56</sup> In *Carroll*, the defendants (a father and son) entered into an installment contract in which the son received a one-half interest in a plantation. The son then leased his one-half mineral interest to the plaintiff. The son defaulted on the installment contract, and the father in turn sued to extinguish the contract. The lessee then brought suit to protect its leasehold interest.<sup>57</sup> After a finding by the trial court that the lease was still effective,<sup>58</sup> the defendants appealed.

On appeal, the court found that the lease was not valid. It stated, "Now the owner of an undivided half of a tract of land has not the right to exploit the land for oil and gas without the consent, implied or express, of his co-owner, and not having this right himself he cannot confer it upon a lessee."<sup>59</sup> Much of the court's rationale of this rule was based on old Roman and French law.<sup>60</sup> "Co-owners are owners par mi et par tout, of

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55. See *infra* part IV.

56. 82 So. 277 (La. 1919).

57. It seems that when the lease was entered into there was no knowledge of any oil on the property. Before the plaintiff company entered the land, oil was found on neighboring lands and apparently the lease had "became a disadvantageous one to the defendants." *Carroll*, 82 So. at 278. The trial court found that the default had been "a mere collusive proceeding [by the defendants] to get rid of the lease" and thus upheld the lease. *Id.*

58. *Id.*

59. *Id.*

60. The court extensively quoted ancient Roman and French property axioms.

part and of the whole. Neither of two co-owners has the exclusive right to any determinate part of the common property."<sup>61</sup> Therefore, either co-owner has a "veto" over any other co-owner's activity on the common land.<sup>62</sup>

In summary, the court rationalized its opinion based on the fact that the defendants could oppose the drilling of a well by the plaintiff because the land "where the well is proposed to be bored belongs to [the defendants] as much as to the [plaintiff]," and neither is entitled to "exclusive possession of it."<sup>63</sup> Therefore, at the very "moment the co-owners cannot agree," the only remedy available to either co-owner is "to demand a partition."<sup>64</sup>

Essentially, the minority rule, as developed in *Carroll*, states that because each cotenant owns a percentage of every element of the property, neither can have exclusive control without consent of the other. Allowing one cotenant to operate the entire parcel, even though he only owns a portion of it, seems to give him a greater right than justified by his interest.<sup>65</sup>

However, this restrictiveness has recently been relaxed by statute. Prior to 1987, "unanimous consent among co-owners" was required before development of the mineral interest could occur.<sup>66</sup> In 1987, the Louisiana Mineral Code was amended to require ninety percent rather than unanimous consent.<sup>67</sup> And in 1988, the Code was again amended to its present form. Today, the Code states that a cotenant "may not conduct operations on the property subject to the servitude without the con-

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*See id.* at 278-80. Central to much of this analysis is the idea that a co-owner owns a quota of land rather than any specific entity. It is an overstepping of ownership for one having only a quota of land (and an abstract quota at that) to exercise on the totality of the common property. How can one exercise operations on the entire property when he owns only a quota of it, and really only a quota in the abstract because—absent a partition—the cotenant cannot point to any specific entity of the property that represents his quota?

61. *Id.* at 278.

62. *See* Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil and Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 815 (1992).

63. *Carroll*, 82 So. at 280.

64. *Id.* The court added that "[a]ny other doctrine would lead to armed conflict between the parties." *Id.*

65. *See supra* notes 59-60 and accompanying text.

66. Angela J. Crowder, Comment, *Mineral Rights: The Requirement of Consent Among Co-Owners*, 48 LA. L. REV. 931, 933 n.13 (1988); *see also* Guy E. Wall, *Joint Oil and Gas Operations in Louisiana*, 53 LA. L. REV. 79, 84 (1992).

67. Wall, *supra* note 66, at 85.

sent of co-owners owning at least an undivided eighty percent interest in the servitude."<sup>68</sup>

There is a "very limited" exception to this rule,<sup>69</sup> which allows a cotenant to act without the consent of the other cotenants. A cotenant is allowed "to prevent waste or destruction or extinction" of the property by extracting the oil and gas without the normal unanimous consent requirement.<sup>70</sup> However, thus far the courts have allowed this exception only when a neighboring property owner was draining the common property.<sup>71</sup> Therefore, in Louisiana, a cotenant must jump through either of two hoops to operate on the land. First, he can obtain the consent of at least eighty percent of the other cotenants. Or, he can operate without obtaining consent if he is preventing the destruction of the interest and can show irreparable harm. However, it is clear that both statutory law and jurisprudence "strongly favor[] the nonconsenting co-owner."<sup>72</sup>

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68. LA. REV. STAT. ANN. § 31:175 (West 1989). The statute further states that the remaining cotenants who do not consent have "no liability for the costs of development and operations except out of [their] share of production." *Id.*; see also *id.* § 31:164.

69. Crowder, *supra* note 66, at 938-39.

70. LA. REV. STAT. ANN. § 31:176 (West 1989). In full, the statute reads as follows:

A co-owner of a mineral servitude may act to prevent waste or the destruction or extinction of the servitude, but he cannot impose upon his co-owner liability for any costs of development or operation or other costs except out of production. He may lease or otherwise contract regarding the full ownership of the servitude but must act at all times in good faith and as a reasonably prudent mineral servitude owner whose interest is not subject to co-ownership.

*Id.* As the statute makes clear, no liabilities can be placed on nonconsenting owners except out of production. Thus, a cotenant acting to prevent waste should still try to obtain consent because if the development proves to be costly and with little return, he is stuck with all costs even though he was only attempting to protect the property itself.

71. The seminal case in this area is *United Gas Public Service Co. v. Arkansas-Louisiana Pipe Line Co.*, 147 So. 66 (La. 1932). Crowder writes that the "only case to consider the matter since *United Gas* refused to allow one co-owner to operate without consent where he failed to show that he would suffer irreparable injury." Crowder, *supra* note 66, at 939. Therefore, it appears that even though the statute allows a cotenant to act without consent to preserve the property, he must also show "irreparable injury"; such a judicial gloss would make it usually very difficult to succeed. And because the developing cotenant can easily be stuck with all liabilities of the development, see *supra* note 68, this exception can be a risky one to rely on.

72. Crowder, *supra* note 66, at 944. For more on Louisiana oil law governing co-ownership of oil rights, see Martin & Yeates, *supra* note 62, at 814-17.

*B. West Virginia*

Unlike Louisiana, West Virginia does not have a statutory scheme which explicitly states that a cotenant may not develop the land without consent of the cotenants. However, like many other states, West Virginia does have a statute prohibiting waste by a cotenant.<sup>73</sup> The following question then arises: Are operations by a cotenant, without the consent of the other cotenants, on the common property considered waste? As previously established, a large majority of states answer no.<sup>74</sup> West Virginia jurisprudence, to the contrary, answers yes.

In *South Penn Oil Co. v. Haught*<sup>75</sup> the West Virginia Supreme Court held that a person holding a one-fourth interest in the oil and gas of a tract of land could enjoin the operations of the other cotenants. The court announced that the defendant "had no right to extract the oil without his cotenant's consent, and could confer no such right upon another [i.e., a lessee]."<sup>76</sup> The court then declared that extraction "by one joint tenant, of oil and gas without the consent of his cotenant, constitutes waste" and the plaintiff has a remedy of damages.<sup>77</sup>

The West Virginia court announced in *Law v. Heck Oil Co.*<sup>78</sup> two limitations on the rule that operations without consent of a cotenant amount to waste. First, a cotenant may be able to extract oil and gas without consent if the pool is in danger of dissipation through drainage.<sup>79</sup> Second, a cotenant's right is also subject to the rights of other cotenants to "compel partition or sale as provided by statute."<sup>80</sup>

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73. "If a tenant in common, joint tenant, or parcener commit waste, he shall be liable to his cotenants, jointly or severally, for damages." W. VA. CODE § 37-7-2 (1966).

74. See *supra* notes 25, 47, 52 and accompanying text.

75. 78 S.E. 759 (W. Va. 1913).

76. *Id.* at 761.

77. *Id.*; see also *Williamson v. Jones*, 27 S.E. 411, 413 (W. Va. 1897) ("Waste is an injury to the freehold by one rightfully in possession. This marks the distinction between waste and trespass." Without the consent of the other cotenants, the defendant was guilty of waste by boring for oil.) (citations omitted); Jeff L. Lewin et al., *Unlocking the Fire: A Proposal for Judicial or Legislative Determination of the Ownership of Coalbed Methane*, 94 W. VA. L. REV. 563, 665 (1992).

78. 145 S.E. 601 (W. Va. 1928).

79. *Id.* The right to act in order to protect the interest from drainage is essentially recognized in every jurisdiction. However, whereas Louisiana requires a showing of "irreparable harm," West Virginia apparently only requires a showing that the pool is "being drained away" or that "such drainage will likely occur through other neighboring wells now drilling." *Id.*

80. *Id.*



It also seems irrelevant how small the cotenant's interest may be. In *Law*, the court granted injunctive relief to a plaintiff against the developing defendants, even though the plaintiff held only a 1/768 interest in the oil and gas underlying a tract of 131½ acres. A cotenant, the court stated, sits as "an unqualified owner of real estate or an interest therein [and] is entitled to have it remain in such condition as he sees fit."<sup>81</sup>

West Virginia also provides a statute giving a nonconsenting cotenant a right of accounting.<sup>82</sup> Consequently, a nonconsenting cotenant has two possible causes of action against an operating cotenant: either an action for waste, in which he can receive an injunction or damages or both, or an action for accounting wherein he implicitly consents to the operation and seeks his just proportion of the net proceeds.

### C. Illinois

Early Illinois case law established a clear rule that "one tenant in common may not operate oil against the protest or without the consent of the other tenants in common."<sup>83</sup> To so act would constitute waste and destruction of the property rights.<sup>84</sup> Indeed, the rule was rather harsh. In essence, it "requires [the cotenants] to agree upon the operation of the land for oil and gas."<sup>85</sup> If the cotenants could not agree, the only remedy was partition.<sup>86</sup>

Eventually, the Illinois courts did develop one exception from the firm rule that any operation on the land without the consent of all the cotenants was considered waste. In the context of oil and gas interests, one court held that the "stern rule of liability of a cotenant, who commits waste or damage to the common property, has been relaxed where the profit taken from the land is of a fugacious nature and liable to be exhausted by adjacent operators."<sup>87</sup> Thus, like other states, Illinois recognized an exception to the waste rule when the land was

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81. *Id.*

82. "An action of account may be maintained . . . by one joint tenant, tenant in common, or coparcener or his personal representative against the other, or against the personal representative of the other, for receiving more than his just share or proportion." W. VA. CODE § 55-8-13 (1966).

83. *Zeigler v. Brenneman*, 86 N.E. 597, 600 (Ill. 1908).

84. See 1 KUNTZ, *supra* note 1, § 5.4.

85. *Zeigler*, 86 N.E. at 601.

86. *Id.*

87. *Pure Oil Co. v. Byrnes*, 57 N.E.2d 356, 362 (Ill. 1944).

being drained or in imminent danger of being drained. As would be expected, the nonconsenting cotenants still had the right to require an accounting.<sup>88</sup>

A statute was passed in 1939 which codified this common law rule. It allowed "owners of such majority in interest" to drill and remove oil and gas without consent of the minority cotenants if "the oil or gas is being drained or is in imminent danger of being drained from such lands by means of wells on other lands."<sup>89</sup> This statute has since been amended, deleting the requirement that drainage or imminent danger of drainage be present. The current statute reads as follows:

When the right to drill for and remove oil and gas from any lands in this State is owned by joint tenants, or tenants in common, . . . any one or more of the persons owning a ½ interest or more in the right to drill for and remove the oil and gas from such lands *may be authorized* to drill for and remove oil and gas from such lands in the manner hereinafter provided.<sup>90</sup>

Notice that the right "may be authorized" if the consent of a majority of cotenants is obtained. The cotenants desiring to drill must not only get the requisite consent, but also ask "the court for permission to drill for and remove oil and gas," showing that the removed minerals will be "for the use and benefit of all the owners of . . . such lands."<sup>91</sup>

Like Louisiana, Illinois allows a cotenant to extract minerals without unanimous consent of the co-owners, so long as a certain percentage of cotenants do consent. Once a cotenant meets both the consent requirement and obtains authorization from the court, he may drill for and extract the oil and gas. A nonconsenting cotenant is left with the cause of action to require an accounting.

#### D. Michigan

Although Michigan case law is not nearly as extensive as that of the states previously discussed, "it is apparent that the removal of minerals by a cotenant without the consent of the

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88. *Id.*

89. *Reward Oil Co. v. White*, 77 N.E.2d 436, 437 (Ill. App. Ct. 1948) (quoting 1945 Ill. Laws ch. 104, ¶¶ 26, 31).

90. ILL. ANN. STAT. ch. 765, para. 520/1 (Smith-Hurd 1993) (emphasis added).

91. ILL. ANN. STAT. ch. 765, para. 520/2 (Smith-Hurd 1993).

other cotenants constitutes waste."<sup>92</sup> In 1942, the state passed a statute which now governs the right cotenants have to extract oil and gas. The statute states that,

Tenants in common, joint owners, cotenants or coparceners as hold a majority in interest in the title to such lands or the oil and gas rights in such lands shall be authorized to explore, drill, mine, develop and operate such lands for oil and gas mining purposes and remove and transport oil and gas . . . or store the same on said lands, and sell and dispose of the same in the manner hereinafter provided.<sup>93</sup>

Although it appears very similar to Illinois's statutory requirements,<sup>94</sup> the Michigan statute is significantly different. Recall that in Illinois, the cotenant is required to first show a majority consent; he is then required to obtain authorization from the courts. Michigan only requires that the cotenant obtain majority consent. He then "shall" have authority to develop, rather than "may" develop as in Illinois. However, like the Illinois statute, the Michigan statute does not require proof that the land is being drained or in imminent danger of drainage.<sup>95</sup>

### *E. An Evaluation of the Minority Rule*

Although only four states follow the minority rule, and each in differing degrees, these four states do have significant oil, gas, and other mineral reserves.<sup>96</sup> As explained earlier, an

92. 1 KUNTZ, *supra* note 1, § 5.4; see also *Campbell v. Homer Ore Co.*, 16 N.W.2d 125 (Mich. 1944).

93. MICH. COMP. LAWS ANN. § 319.101(1) (West 1984).

94. See *supra* notes 90-91 and accompanying text.

95. See 2 W.L. SUMMERS, *THE LAW OF OIL AND GAS* § 222 (1954).

96. A recent Virginia case seems to express the slim possibility that the number of states following the minority rule may become five. The case itself involved fractional mineral interests, but the mineral involved was coal rather than oil and gas. Eighty-five percent of the owners wanted to mine, while fifteen percent did not. The court defined waste as "[a] destruction or *material alteration* or deterioration of the freehold . . . by any person rightfully in possession, but who has not . . . the full estate." *Chosar Corp. v. Owens*, 370 S.E.2d 305, 307 (Va. 1988) (quoting BLACK'S LAW DICTIONARY 1425 (5th ed. 1979)) (emphasis added). Consequently, it considered that mining without the consent of all owners constituted waste. The court wrote, "In the case of tenants in common, no tenant can change or alter the common property to the injury of his cotenants without their consent. Injunctive relief against a cotenant is proper where the injury is material, continuing, and not adequately remedied in damages." *Id.* at 307 (citation omitted).

The dissent claimed that the above rule is "neither required nor justified by existing Virginia law; moreover, it is not sound in principle or logic." *Id.* at 309 (Thomas, J., dissenting). Justice Thomas would have applied the "majority rule

oil and gas interest has speculative value separate from the value of the resources themselves.<sup>97</sup> Should not this value be recognized to the same extent as the value obtained by extracting the minerals? Should not a co-owner have an equally strong right to leave the minerals in the ground as another co-owner's right to extract them? Moreover, there is esoteric value to Louisiana's argument that it seems illogical to allow one person who has an abstract quota of a mineral interest the right to take possession of the whole as long as he accounts for profits in excess of his proportion.

As explained earlier, counterarguments exist.<sup>98</sup> Economically and socially, it may be wasteful and unfair to allow one person with a very small interest to veto the interests of a much larger group of cotenants. Furthermore, it may be equally unfair to allow one person holding a fifty-one percent interest, who is acting completely unreasonably, to veto the reasonable desires of a large group of persons collectively owning forty-nine percent of the mineral interest. But, as mentioned, the argument is equally legitimate in its reciprocal form.

Perhaps a more equitable and logical rule could exist somewhere in between these two conflicting rules. The balance of this Comment will propose a model statute which represents an attempt to address the values promoted by both the majority and minority rules and to provide cotenants a forum to work out differences in a rational and reasonable manner.

#### IV. A MODEL STATUTE FOR THE DEVELOPMENT OF OIL AND GAS INTERESTS HELD UNDER JOINT OWNERSHIP

The substance and procedures contained in this model statute are drawn from statutes dealing with another interest in property which shares many similar characteristics with oil and gas: water rights.<sup>99</sup> Many state water codes have elabo-

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regarding extraction of oil and gas." *Id.* at 310 (Thomas, J., dissenting). This rule is the rule that has already been explained above. *See supra* part II.

The dissent was convinced that the majority had moved away from prior analysis. Whether the court will continue to move toward the minority view is questionable; however, the language of the majority opinion could easily support the adoption of the minority rule in Virginia.

97. *See supra* note 54 and accompanying text.

98. *See supra* part II.B.

99. Although significant differences certainly exist, similarities between these two rights, especially in the area of co-ownership, allow water statutes dealing with co-ownership to provide a useful analogy when dealing with oil and gas

rate statutory schemes designed to deal with conflicts that arise between co-owners. This Comment draws from this material in developing a model statute to deal with similar conflicts arising between cotenants in oil and gas interests. It should be noted that the water codes used are drawn from western states that recognize appropriation, rather than riparian, water rights. As a result, much of the material that follows would be inapplicable to riparian states.

In essence, this model statute establishes an authorization process through which a cotenant must go to develop oil and gas in common property without the consent of all cotenants.<sup>100</sup> Under this model statute, a request for authorization must be either ratified or rejected by the state's oil and gas administrative agency. Such agencies are already established and fully capable of performing such a task.<sup>101</sup> The authorization process includes six steps: (1) the applicant must file a request for authorization; (2) the applicant must see that notice is provided to all cotenants; (3) the state agency reviews the applicant's request; (4) cotenants are given the opportunity

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rights. For example, water interests and oil and gas interests are unique in relation to other property interests because of their tendency not to remain stationary. Often, when one speaks of "ownership" of these interests, the term only implies a right to use or extract them. Once they are captured, then a more common connotation of ownership is enjoyed. See 2 OWEN L. ANDERSON & PAULINE M. SIMMONS, *WATERS AND WATER RIGHTS* § 16.01 (Robert E. Beck ed., 1991) (discussing water rights); 1 KUNTZ, *supra* note 1, § 2.4. Furthermore, because good water, oil, and gas are all very valuable, conflicts easily arise between people who share common ownership interests in the same quantity.

100. See *infra* Appendix, MODEL STATUTE: DEVELOPMENT OF OIL AND GAS RIGHTS HELD UNDER JOINT OWNERSHIP § 1-1-01 [hereinafter MODEL STATUTE].

101. In most oil and gas states, elaborate administrative agencies oversee the oil and gas production within the state. These agencies generally focus on environmental and conservation issues, and are often preoccupied with pooling and unitization orders and procedures. Because these agencies are fully operating, having them oversee these rather simple proceedings would be no trouble. For some examples of statutes establishing, outlining, and governing these agencies, see the following:

- Alabama: ALA. CODE § 9-17-3 (1987 & Supp. 1993);
- Alaska: ALASKA STAT. §§ 31.05.005, 31.05.030 (1985);
- Arkansas: ARK. CODE ANN. §§ 15-71-101, 15-71-106, 15-71-111 (Michie 1987 & Supp. 1991);
- Kentucky: KY. REV. STAT. ANN. §§ 353.530, 353.565 (Michie 1993);
- Louisiana: LA. REV. STAT. ANN. §§ 30:1, 30:6 (West 1989 & Supp. 1993);
- Mississippi: MISS. CODE ANN. §§ 53-1-5, 53-1-7, 53-1-17 (1972 & Supp. 1992);
- Montana: MONT. CODE ANN. §§ 82-10-101, 82-11-111, 82-11-144 (1992);
- North Dakota: N.D. CENT. CODE §§ 38-08-04, 38-08-09.2 (1987 & Supp. 1993);
- Utah: UTAH CODE ANN. § 40-6-4 (1993);
- West Virginia: W. VA. CODE §§ 22-8-4, 22-8-11 (1985 & Supp. 1993).

to protest the request; (5) the state agency makes its administrative decision certifying or denying the request; and (6) either the requesting or a protesting party must be given the right to appeal that decision. Each of these steps will now be discussed.

### A. *Filing a Request for Authorization*

When seeking an allocation or transfer of water rights in an appropriation state, the first step a party undertakes is the filing of an application for transfer with the state administrative agency.<sup>102</sup> Likewise, the first step a cotenant should take when attempting to develop the common property is to file a request for authorization with the state oil and gas agency.<sup>103</sup> The request form, provided by the agency, should not be complex and should require that three factors be shown, although more could be required if the state feels additional information is necessary.

First, the cotenant should show evidence of his interest in the land and describe its extent.<sup>104</sup> Second, the cotenant should show that procedures to notify the other cotenants are underway. The cotenant should be able to provide a list of all other oil and gas interest holders in land, with their addresses. If some cotenants are unknown or cannot be found, the cotenant would need to show that reasonable efforts have been made to locate these cotenants.<sup>105</sup> Third, the cotenant should show that he has obtained the consent of a certain percentage of the other cotenants. The model statute suggests that the required consent should come from at least sixty-five percent of the interest in the land and at least a majority of the cotenants themselves, without regard to the amount of interest they hold.<sup>106</sup>

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102. See generally 2 ANDERSON & SIMMONS, *supra* note 99, § 16.01(c); Bonnie G. Colby et al., *Procedural Aspects of State Water Law: Transferring Water Rights in the Western States*, 31 ARIZ. L. REV. 697, 697-706 (1989).

103. *Infra* app., MODEL STATUTE § 1-1-02(1).

104. *Infra* app., MODEL STATUTE § 1-1-02(1)(a).

105. *Infra* app., MODEL STATUTE § 1-1-02(1)(b).

106. *Infra* app., MODEL STATUTE § 1-1-02(1)(c). Perhaps some examples would explain this requirement more clearly. Assume that a cotenant held 75% of a mineral interest and the remaining 25% was split among three people. If the majority tenant wanted to develop, he has already met the first prong because more than 65% of the interest is represented. However, he would have to convince at least two other cotenants and obtain their consent before he could act. If only two people shared the remaining 25%, then he would only have to obtain the consent of one.

Requiring this two-tiered consent would serve several purposes. Initially, although not as restrictive as the Louisiana<sup>107</sup> or West Virginia statutes,<sup>108</sup> it does give minority interest holders much more protection than they receive under the majority rule. For example, if one cotenant has a large interest, he cannot bully the cotenants with smaller interests since he needs a majority consent to act. Likewise, a cotenant (or a group of cotenants) with very small interests cannot force the cotenants with larger percentages to develop the land until they have the consent of persons who together hold over 65% of the interest.

Requiring both a percentage of the mineral interest and a majority of interest holders is a fair method of protecting both cotenants who own a substantial portion of the mineral interest and cotenants who hold much smaller percentages. It is reasonable that if a majority of interest holders want to develop or not develop, their voice should rule. However, it would be unfair for a majority of cotenants, together owning less than 5%, to control the common property's development when the minority cotenants own the remaining 95%. This two-tiered consent requirement would fairly compensate for both situations. Although the Model Statute sets the requirements at 65% of the interest and a majority of the cotenants, individual states could set these standards at whatever level each thinks is most equitable.

### *B. Notice to Fellow Cotenants*

In the water transfer process, the next step after filing the application is to publish notice alerting other water right holders of the potential transfer.<sup>109</sup> Although an applicant for a water transfer would give public notice, generally in a newspaper, a cotenant seeking authorization to drill should instead be required to give notice to other cotenants by certified mail.<sup>110</sup>

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Now assume that one cotenant held 30% and nine others had equal shares of the remaining 70% of the interest. For any one of the minority interest holders to develop, he could either get the consent of the majority holder and four other minority holders, or of the remaining eight minority holders.

107. See *supra* part III.A.

108. See *supra* part III.B.

109. See ARIZ. REV. STAT. ANN. § 45-172(7) (1987); NEV. REV. STAT. § 533.095 (1992); UTAH CODE ANN. § 73-3-6 (1989).

110. *Infra* app., MODEL STATUTE § 1-1-03(2).

This notice should contain two items. First, the notice should describe in sufficient detail the operations that the consenting cotenants propose to perform.<sup>111</sup> Any lessees involved should be listed. The standard defining "sufficient detail" should be determined by the state agency. At a minimum, the notice should describe all proposed operations, dates, geographical locations, and all other relevant information.

Second, the notice should announce that any cotenant protesting this proposed activity shall be given an opportunity to be heard.<sup>112</sup> A protesting cotenant will be provided an informal hearing with the oil and gas commission and other interested cotenants. The protesting cotenant should be provided with all relevant information about protest procedures, including the time limit in which the protest must be filed, the location where the protest must be filed, and the information that the protest should include.<sup>113</sup>

### C. Review by the State Agency

The initial review of the request for authorization by the state agency should be brief. Essentially, the state agency should make three determinations.<sup>114</sup> First, the agency should make sure that the cotenant filing the request and all those consenting have legitimate interests in the land. All the information needed to make this decision should be filed with the request. Second, the agency should make sure that the two-tiered consent requirement is met. Third, the agency should decide whether the proposed operations seeking to be authorized are reasonable.<sup>115</sup> If any of these three elements is not met, the request should be denied, with immediate notification of such denial sent to the requesting cotenant. This notification should contain a brief statement explaining why the request was denied.<sup>116</sup> If all elements are met and the request passes

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111. *Infra* app., MODEL STATUTE § 1-1-03(1)(a).

112. *Infra* app., MODEL STATUTE § 1-1-03(1)(c).

113. *Infra* app., MODEL STATUTE § 1-1-03(1)(d).

114. *Infra* app., MODEL STATUTE § 1-1-04.

115. It is encouraged that this be a very minimal standard of reasonableness. It is tempting to simply have a rational standard, but "reasonable" seems to offer a little more bite, and if the proposed operations are completely unreasonable, the agency should save everyone a lot of time and deny the request. However, it would be expected that very few requests would be denied because they are unreasonable.

116. *Infra* app., MODEL STATUTE § 1-1-04(3).



the initial agency review, it will receive a presumption of validity.<sup>117</sup>

#### D. Protest

In a procedure to transfer water rights, after notice is given, interested parties are given a certain amount of time to file protests.<sup>118</sup> The Model Statute has incorporated a similar provision.<sup>119</sup> The time limit to protest a proposed transfer of water rights generally begins on the last day of public notice and can range from ten days to thirty days, or whatever is posted in the public notice.<sup>120</sup> In a request for an oil and gas authorization proceeding, this time period should begin individually on the date each cotenant receives notice through certified mail. States should set the time limit according to their respective policies and circumstances, always giving reasonable time to nonconsenting cotenants to react to the proposal. However, the time limit should not be so long that it stifles or is detrimental to the efficiency of the authorization process.

In order to rebut the presumption of validity created after a request passes the initial agency review, the protesting cotenant should state specific facts showing why the proposed operations are not reasonable.<sup>121</sup> The agency should then review the protest. If it determines that the protest is legitimate, proceedings should be instigated to resolve the protest.

#### 1. Informal versus formal resolution

Because a protest tends to increase the cost and amount of time necessary to authorize or deny the request, informal proceedings should be utilized to their fullest extent.<sup>122</sup> In water

117. *Infra* app., MODEL STATUTE § 1-1-04(4).

118. See 2 ANDERSON & SIMMONS, *supra* note 99, § 16.01(c); Colby et al., *supra* note 102, at 703.

119. *Infra* app., MODEL STATUTE § 1-1-05(1).

120. See Colby et al., *supra* note 102, at 717 tbl. 2.

121. *Infra* app., MODEL STATUTE § 1-1-05(2)(b). The protesting party may rebut the presumption of validity by attacking any one of the three findings the state agency must initially make. See *supra* part IV.C. However, the first two prongs should generally not be rebuttable because the state agency will have already verified whether or not they are met. Therefore, the third prong, finding whether the proposed application is reasonable, should (if the agency is doing its job) be the only finding that could be attacked.

122. Commentators have noted that when protests are filed in water transfer proceedings, the process enters into a "critical and costly part" which can significantly delay the process. Colby et al., *supra* note 102, at 703. For a detailed analy-

transfers, "informal hearings are preferred by the State Engineer, the applicants and the protestors. Informal proceedings encourage openness in which the parties state their positions in dialogue form."<sup>123</sup>

Because "informal" resolution of conflicts is generally "the least expensive and swiftest" means to resolve protests,<sup>124</sup> the Model Statute provides only for informal proceedings in which a protester has a forum to present his arguments on why the proposed action should not be allowed.<sup>125</sup> These informal proceedings should be conducted by the state agency and governed by the state administrative procedure act.

## 2. *Burden of proof*

As mentioned, the requesting cotenant should have an initial burden of proof of showing three items in his request for authorization.<sup>126</sup> Once this initial burden is met, the request should be presumed to be valid. The protesting cotenant should then have the burden of proof to state specific facts showing why the proposal is unreasonable.<sup>127</sup> If the protester does produce evidence demonstrating that the proposal is not reasonable and should not be authorized, the requesting cotenant may rebut that evidence. However, in the end, the protesting party should always have the burden of persuasion.<sup>128</sup> Because of the fairly high consent requirements a cotenant must initially pass, a protesting cotenant should provide a convincing case to obtain a denial of the request.

### *E. The State Agency's Decision*

After a request for authorization is filed, and either the time for protest has passed with no protests filed, or after an informal hearing has been conducted, the state agency should give an authorization or denial of the request. If the request has passed the initial agency review, and no protests have been

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sis on the effect of protests on the water transfer process, see 1 LAWRENCE J. MACDONNELL, *THE WATER TRANSFER PROCESS AS A MANAGEMENT OPTION FOR MEETING CHANGING WATER DEMANDS* 46-48 (1990).

123. Ray J. Davis, *Utah Water Rights Transfer Law*, 31 ARIZ. L. REV. 841, 854 (1989).

124. Colby et al., *supra* note 102, at 704.

125. *Infra* app., MODEL STATUTE § 1-1-05(2)(b).

126. *See supra* part IV.A.

127. *See supra* note 121.

128. *See infra* app., MODEL STATUTE § 1-1-05(2)(b).

filed, it should be authorized. A similar result should occur if a nonconsenting cotenant cannot convince the agency that the request is unreasonable.<sup>129</sup>

Furthermore, if the cotenant can show that the land is being drained or is in imminent danger of being drained, the request to drill should be per se reasonable.<sup>130</sup>

#### F. Review of the State Agency's Decision

Any party involved in an informal hearing may appeal the agency's decision.<sup>131</sup> This appeal may either be to the judiciary or within the administrative system, whichever is provided for in the state's administrative procedure statutes. In water transfer proceedings, the time a party is allowed to prepare an appeal ranges from fifteen to thirty-five days.<sup>132</sup> The time limit should allow the appellant a reasonable time to prepare an appeal, but should be short enough for review while the facts are fresh.

Because the state agency is specially trained in dealing with oil and gas issues, the reviewing body should use the abuse of discretion standard rather than perform a de novo hearing.<sup>133</sup> In relation to water transfer hearings, *Schuh v. State Department of Ecology*<sup>134</sup> recognized that "due deference must given 'to the specialized knowledge and expertise of the administrative agency.' Here, the [state agency] is in a far better position to judge what is in the public interest regarding water permits than a court."<sup>135</sup> Many other states have expressed similar views.<sup>136</sup> Proceedings performed by the state oil and gas agency should receive similar deference.

The reviewing body should answer three questions: "[F]irst, did the agency act within the scope of its delegated authority; second, did the agency employ fair procedures; and third, was

129. See *supra* note 121.

130. *Infra* app., MODEL STATUTE § 1-1-04(3).

131. *Infra* app., MODEL STATUTE § 1-1-06(1).

132. See Colby et al., *supra* note 102, at 719 tbl. 4.

133. *Infra* app., MODEL STATUTE § 1-1-06(2).

134. 667 P.2d 64 (Wash. 1983).

135. *Id.* at 68 (quoting *English Bay Enters. Ltd. v. Island County*, 568 P.2d 783, 786 (Wash. 1977)).

136. See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 731 (Cal.), *cert. denied*, 464 U.S. 977 (1983); *In re Change of Appropriation Water Rights*, 816 P.2d 1054, 1060 (Mont. 1991); *In re Applications T-61 & T-62*, 440 N.W.2d 466, 470 (Neb. 1989); *Revert v. Ray*, 603 P.2d 262, 264 (Nev. 1979); *Wyoming State Engr' v. Willadsen*, 792 P.2d 1376, 1379 (Wyo. 1990).

the agency action reasonable."<sup>137</sup> When answering the third question, the reviewing body should only look for abuse of discretion and "not substitute its independent policy judgment."<sup>138</sup> It should uphold the agency's action "unless the action is arbitrary, capricious, or lacking in evidentiary support."<sup>139</sup>

## V. CONCLUSION

As the law currently stands, a state has only two fairly rigid rules to choose from when presented with the issue of a cotenant developing the common property without the consent of the other cotenants. The majority rule strongly favors the cotenant desiring to develop, essentially giving him an unqualified right to extract the oil, notwithstanding the other cotenants' desires. On the other hand, the minority rule similarly favors the nonconsenting party. Neither rule has a safety valve to protect against unreasonable behavior by either group of cotenants, and neither rule recognizes that oil and gas interests are often valued in different ways.

This Comment proposes a possible solution. The significant number of cases discussing this issue shows that the problem is a difficult one. This middle-of-the-road approach gives minority cotenants some say in how the common property should be developed, but not an overriding veto. However, after the consent requirements are met, the reasonable aspirations of a majority of cotenants and super-majority of the actual interest should be enabled to proceed.

*Curtis Anderson*

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137. *United States v. State Water Resources Control Bd.*, 227 Cal. Rptr. 161, 176 (Ct. App. 1986) (quoting *California Hotel & Motel Ass'n v. Industrial Welfare Comm'n*, 599 P.2d 31 (Cal. 1979)).

138. *Id.*

139. *Id.*

APPENDIX

MODEL STATUTE

DEVELOPMENT OF OIL AND GAS RIGHTS HELD  
UNDER JOINT OWNERSHIP

1-1-01 Purpose of the Statute

The purpose of this model statute is to address the needs of both minority and majority interests in oil and gas rights under joint ownership. This statute seeks to protect both interests by providing requirements a cotenant must meet before he or she can develop the common property without full consent of all cotenants, and by providing a forum in which protesting cotenants may present opposing arguments against development. All applications and hearings will be brought before the State Oil and Gas Agency.

1-1-02 Application for Authorization of the Proposed Development

(1) An application for the development of oil and gas interests held in joint ownership must be filed with the State Agency. Such application shall be upon forms furnished by the State Agency and shall provide the following:

(a) The cotenant shall provide evidence of his or her interest in the land and adequately describe its extent.

(b) The cotenant shall show that procedures to notify all other cotenants are underway. To fulfil this requirement, the cotenant need only show that the cotenants owning oil and gas interests, not surface interests, are being notified. If some cotenants are unknown or cannot be found, the cotenant must show that reasonable efforts have been exerted to locate these cotenants.

(c) The cotenant must obtain the consent of:

(i) at least sixty-five percent (65%) of the oil and gas interests in the land; and

(ii) a majority of the cotenants themselves, without regard to the amount of interest they hold.

(2) The cotenant shall provide adequate evidence and documentation which allows the State Agency to verify each element in subsection (1).

(3) The State Agency may require an application fee to accompany the application.

1-1-03 Notice to Fellow Cotenants

(1) The applicant shall give all other cotenants, to the extent possible, notice of the proposed development. The notice shall provide:

(a) a description sufficiently detailing what operations the applicant (and those consenting) proposes to perform, including dates, geographical locations, and other relevant information;

(b) a list of all lessees involved or potentially involved;

(c) an announcement that any cotenant protesting this action shall be given an opportunity to be heard; and

(d) an announcement that a cotenant wishing to protest shall be given all relevant information about protest procedures, including the time limit to file a protest, the information the protest should include, and any costs.

(2) All notice shall be provided by certified mail.

#### 1-1-04 Review by the State Agency

(1) Approval of the State Agency is required for any development of oil and gas interests held in joint ownership.

(2) The agency shall determine whether the applicant has met all the requirements listed in section 1-1-02.

(3) The agency shall then determine whether the proposed development is reasonable.

(4) If the application passes subsections (2) and (3), it shall then be given a presumption of validity.

(5) If the application fails any requirement in section 1-1-02 or is found to be an unreasonable proposal, it shall be denied.

(6) The state agency shall notify the applicant as to its finding under subsection (4) or (5). If the agency denies the application, it shall provide a brief statement explaining the reason(s) why the application was denied.

#### 1-1-05 Protest

(1) Any cotenant desiring to protest an application for development of oil and gas interests shall file notice with the State Agency within ( ) working days following the date the cotenant was notified by certified mail. The State Agency must fully consider the evidence provided by such person during the review of the application.

(2) The applicant has the initial burden of showing the requirements in section 1-1-02 and that the proposal is reasonable.

(a) The agency should carry out investigations to confirm or rebut the evidence presented by the applicant if necessary.

(b) If the applicant has met this initial burden, a presumption is created in his or her favor. If a protesting party presents evidence sufficient to rebut any element required to be shown by the applicant, the agency should conduct a hearing to resolve the conflict. Informal procedures must be exhausted before formal procedures are instituted. The burden of persuasion will be on the protesting party.

(c) Informal hearings shall be governed by the State Administrative Procedure Act.

(3) If informal procedures are used, after each protesting cotenant has had a reasonable opportunity to be heard, the State Agency shall either authorize or deny the application.

1-1-06 Review of the Agency Decision

(1) Any party involved in an informal hearing may appeal the State Agency's decision. Such appeals will be conducted according to the State Administrative Procedure Act.

(2) The reviewing body shall apply an arbitrary and capricious or an abuse of discretion standard to the agency's decision. Because the agency is specially trained in dealing with oil and gas issues, it should be accorded a high degree of deference.